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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 6

JOSEPH CARROLL, RICHARD NORTON, J. B. STONER, CHARLES LYNCH, ROBERT LYONS, WILLIAM BRAILSFORD, and the NATIONAL STATES RIGHTS PARTY,

Petitioners,

—v.—

THE PRESIDENT AND COMMISSIONERS OF PRINCESS ANNE, COUNTY, COMMISSIONERS OF SOMERSET COUNTY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF MARYLAND

BRIEF FOR PETITIONERS

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IN THE

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No. 689

JOSEPH CARROLL, RICHARD NORTON, J. B. STONER, CHARLES LYNCH, ROBERT LYONS, WILLIAM BRAILSFORD, and the NATIONAL STATES RIGHTS PARTY,

Petitioners,

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Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF MARYLAND

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Court of Appeals of Maryland is reported at 247 Md. 126 (1967) and is set out in the Appendix at A. 114-124.

Jurisdiction

The judgment of the Court of Appeals of the State of Maryland was entered on June 7, 1967. On September 6, 1967, Mr. Justice [illegible] extended the time within which

to file the Petition for a Writ of Certiorari until October 5, 1967, on which date it was filed. Certiorari was granted on March 3, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

Constitutional Provisions Involved

The Constitution of the United States,

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Whether injunctions barring petitioners from holding public meetings were invalid prior restraints in violation of the First and Fourteenth Amendments.

2. Whether the issuance of the injunctions was justified by the existence of a clear and present danger.

3. Whether this case is moot.

Statement of Case

Petitioners, members or officers of the National States Rights Party, a political organization, participated in an outdoor political meeting on August 6, 1966, in front of the courthouse in the town of Princess Anne, the county seat of Somerset County, Maryland (A. 16, 75). The rally continued from 7:00 P.M. to 8:25 P.M. (A. 51). No violence occurred (A. 75), and no arrests were made (A. 53, 58). Near the end of the rally Richard Norton, one of the speakers, announced that another rally would be held by the Party on the following evening (A. 111).

On the following day, August 7, 1966, the President and Commissioners of the town of Princess Anne and the County of Somerset secured an *ex parte* injunction forbidding petitioners from holding another meeting for ten days until the matter could be heard in the Circuit Court for Somerset County (A. 7-8). The order instructed peti-

tioners to appear on August 17, 1966, to show cause why they should not be permanently enjoined from holding such rallies in Somerset County (A. 7-8).

At the rally of August 6, 1966,[1] the aims and tenets of the National States Rights Party were described by Party attorney, J. B. Stoner (A. 87), as follows (A. 89-90):

> Now the National States Rights Party is a political party. In some parts of the country we run our white supremacy candidates on the general election ballot and in other places we run in the Democratic and Republican primaries. We intend to gain political power and to repeal not only the Civil Rights Act of 1965 but all of the Civil Rights Acts including the one that the distinguished Congress is now passing through.

In keeping with these aims, the speakers variously exhorted their hearers to "organize [to] win every single political objective" (A. 111) and to "organize intelligently, fight intelligently" (A. 93). Governor Agnew and "Joe Alton . . . down in Annarundel County" were specifically criticized for their plans regarding integration (A. 84). The Party intended to "fight in the Courts every legal way we can to smash these vermin, to smash them (sic) (inaudible) plan to assimilate the white race" (A. 84). They vowed to "continue to speak for white America" (A. 102), and beyond "one or two speeches, we're going to be in Court Monday" to attack as illegal injunctions against their picketing while courts nevertheless allow Negroes to picket (A. 102). They counterposed "white power" to "black power" (A. 89), and told the crowd that "The National

[1] The entire meeting was recorded by state officers. The tape was introduced at the August 17, 1966 hearing (A. 75).

States Rights Party advocates every legal, legitimate and political (inaudible). in the book to stop race-mixing" (A. 89).

During the rally the Party informed the audience how to become members (A. 84, 109, 111). Party literature was also distributed (A. 90).

Party speakers discussed the white supremacist view on several political issues, including school integration (A. 85, 87), federal aid (A. 85, 88, 89), federal school desegregation guidelines (A. 88, 89), the Rumford Fair Housing Act in California (A. 103), and the Negro movement and its demands (A. 91-92, 96-97), all of which were denounced. In particular the speakers emphasized the local political situation, several times exhorting the crowd to "phone . . . write, [and] buttonhole John Bond," the head of the local school system, to bring political pressure on him to the end that local schools not be integrated (A. 92, 94-95, 110). Their advice to Negroes was to "start taking reservations for Africa," where they should migrate (A. 111).

Frankly advocating the doctrine of white supremacy, the speakers nevertheless expressly cautioned their audience against resort to violence, for "they think we advocate it, we don't. This is a political battle pure and simple, that's all it is" (A. 87). They urged: "I want you people really hollaring. No violence, just hollering" (A. 95). They advocated "a non-violent shout, that every local politician is going to hear" (A. 111).

Each speaker in turn referred to Negroes as "niggers". Rev. Charles (Connie) Lynch, one of the rally speakers, explained that "every time you call a nigger a colored person, you are apologizing to them because they're black"

(A. 97). Jews were also vilified (A. 96) and the United States Supreme Court caustically criticized (A. 96, 99).

At the August 17th hearing, the County Attorney informed the Court that his witnesses would testify about "what might occur should these demonstrations, rallies, and speeches be allowed to continue" (A. 28). The testimony at the hearing showed that about 25% of the maximum audience of 200 were Negroes (A. 46). According to the testimony of a plainclothes policeman assigned to the rally area, the Negroes remained apart from the whites and "did not mingle among the other groups" (A. 57). Though the Negroes were visibly "disturbed and angry," they "stayed over on this side of the street" (A. 57). There was tension among the whites, but there was no breach of the peace, cause for arrests, or need for police intervention (A. 53, 58, 59). About 60 police officers, including reenforcements from other counties, were on hand (A. 47).

Over the objection of petitioners' counsel, the trial court admitted evidence of unrest and violence in Somerset County in February, 1964, two and a half years earlier, during mass civil rights demonstrations by students at a nearby Negro college demanding that public accommodations be open to all regardless of race (A. 31-39). At that time the violence had been preceded by talk of "murder" and "killing" in "many sections of town" (A. 33). When a disturbance involving several hundred Negro students and local whites occurred, local police were able to bring it under control without reenforcements (A. 37). Neither the National States Rights Party nor the individual petitioners were in Somerset during the 1964 incidents (A. 36). The college was not in session when petitioners spoke

on August 6, 1966 (A. 60). Since the February 1964 demonstrations, there had been little racial tension in the town (A. 65). On cross-examination, an officer testified that race relations before the incidents of February 1964 and thereafter had been good (A. 58).

Paul J. Randall, a captain in the Maryland State police, testified that before the rally, one of the participants, Joseph Carroll, inquired about the local law regarding the use of a public address system and the sponsorship of a rally on the street (A. 44). Captain Randall informed Carroll that the town manager had said that no local ordinance prevented the rally (A. 44). Captain Randall requested Carroll and Stoner not to mention two pending court cases in which Negroes were accused of raping whites (A. 50). He testified that in fact no mention of these cases was made (A. 51). Mention was made of a rape of a seventy-six year old woman thirty-three years ago and of the lynching that followed, but the speaker said: "I am not advocating this but I am just recounting a bit of history" (A. 86). The rally ended ten minutes after a prearranged signal passed from Captain Randall to Carroll when Captain Randall nodded to Carroll that "tension was building" (A. 53).

On August 30, 1966, the Circuit Court for Somerset County issued an order barring the individual petitioners from "holding or sponsoring or . . . speaking" at any public gathering or in any public place on any subject for ten months (A. 19). The Party was enjoined for ten months from participating in public gatherings at which "racial or religious epithets" or language expected to lead to rioting or disorder were used (A. 19).

On June 7, 1967 the Court of Appeals of Maryland affirmed the temporary order of August 7, 1966 but reversed the interlocutory order of August 30, 1966, holding that "the period of time was unreasonable and that it was arbitrary to assume that a clear and present danger of a civil disturbance and riot would persist for ten months" (A. 124).

The constitutional questions presented were raised by petitioners at trial (A. 29) and explicitly rejected by the trial court in its opinion (A. 17-18). Petitioners again raised the constitutional issues in their Motion to Shorten Time for Transmission of Record (A. 22). The same questions were raised on appeal and treated fully on the merits in the opinion of the court below (A. 114-124).

Summary of Argument

I.

The First Amendment forbids prior restraint of speech. *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Kunz* v. *New York*, 340 U. S. 290 (1950). An injunction based on previous speeches which produced neither violence nor a clear threat of violence is especially to be condemned under First Amendment principles. *Thomas* v. *Collins*, 323 U. S. 516 (1945). Such prior restraint is not saved from unconstitutionality by virtue of its being subject to judicial oversight and review, for the harm to speech is in the restraint itself. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1939). Speech may be punished in the case of violence or clear and present danger of violence but the state may not restrain speech because it believes that violence may occur. *Hague* v. *C. I. O.*, 307 U. S. 496 (1939).

II.

The First Amendment protects provocative speech no less than mild speech. *Terminiello* v. *Chicago*, 337 U. S. 1 (1949). The decisions of this Court have always required that speakers with unpopular views be protected, not enjoined because some members of the public may become angered or aroused at their views. *Cox* v. *Louisiana*, 379 U. S. 536 (1965).

Petitioners' prior speeches could not constitutionally form the basis for enjoining a later rally based on the doctrine prohibiting a narrow class of action words called "fighting words." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Petitioners' rally consisted of protected expression of political views and solicitation to join a lawful political party, not face-to-face epithets between individuals. Discussion of racial and religious groups is a matter of public interest and is protected speech even though provocative and offensive to some. *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *New York Times* v. *Sullivan*, 376 U. S. 254 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967).

III.

Petitioners, who have followed the procedures for orderly review announced in *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967), should not on that account be penalized by an inappropriate invocation of the mootness doctrine. If an injunction may not be tested by violating it, then it should be subject to appeal where First Amendment rights are at stake.

The injunction at issue here is not moot, for the existing controversy continues, unabated by an act of the parties,

the effect of a subsequent law or the passage of time. *United States* v. *Alaska S.S. Co.*, 253 U. S. 113 (1920); *Oil Workers Union* v. *Missouri*, 361 U. S. 363 (1960); *Atherton Mills* v. *Johnston*, 259 U. S. 13 (1922). Petitioners are effectively barred from expressing their political philosophy in Somerset County, Maryland. Further, the *ex parte* temporary injunction comprises a new and menacing device inviting public officials to stifle First Amendment expression unless it is disapproved.

ARGUMENT

I.

The temporary and interlocutory injunctions barring petitioners' participation in public meetings were prior restraints on speech in violation of the First Amendment.

Although petitioners' meeting of August 6, 1966, resulted in no disorder or threat of disorder, respondents secured an *ex parte* temporary injunction prohibiting an announced rally for the following evening. The injunction remained in effect for twenty-three days until the court found it convenient to hold a hearing, write an opinion, and issue an interlocutory injunction. Thus, thirty-seven years after this Court condemned prior restraints upon First Amendment activity in *Near* v. *Minnesota*, 283 U. S. 697 (1931),[2] the forbidden doctrine has been restored in the State of Maryland.

Mindful of the history surrounding the adoption of the First Amendment, this Court has examined with special care cases involving restraint upon First Amendment ac-

[2] See 283 U. S. at 719, n. 11, where this Court noted the widespread acceptance among the states of the "general principle . . . of immunity from previous restraints" even before *Near*.

tivity. Although the disfavor in which the Court holds prior restraints "cannot be regarded as exhausting the guaranty of [First Amendment] liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision." *Lovell* v. *Griffin*, 303 U. S. 444, 451-452 (1938).[3] That "leading purpose" reflects the use of prior restraints under British law of which the draftsmen of the Constitution were especially aware.[4] In reaction to prior censorship as practiced in England,[5] the framers developed a concept of free expression whose essence was immunity from prior restraint. Blackstone described it as

> ". . . consist[ing] in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity . . . . [T]he only plausible argument heretofore used for restraining the just freedom of the press, 'that it was necessary to prevent the daily abuse of it.' will entirely lose its force when it is shown that the press can not be abused by any bad purpose without incurring a suitable punishment; whereas it

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[3] "If anything at all is clear about what the founders meant by the language of the First Amendment, it is that it was designed to prohibit prior restraints." Shapiro, Freedom of Speech: The Supreme Court and Judicial Review, 152 (1966).

[4] For a discussion by the Court of the significance of the history of prior restraints in England on the development of the First Amendment, see *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245-249 (1936). See also Chafee, Free Speech in the United States, 9-12 (1941).

[5] See Story on the Constitution, ¶1882, v. 2.

never can be used to any good one under the control of an inspector."[6]

Story accepted the Blackstonian view that free speech is a matter of immunity from prior restraint.[7] But this Court has said that "[t]he criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions." *Near* v. *Minnesota, supra* at 714-715. The special disfavor of prior censorship is embodied in the rule that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books* v. *Sullivan*, 372 U. S. 58, 70 (1963). See also *Lovell* v. *Griffin, supra*, at 451; *Schneider* v. *Irvington*, 308 U. S. 147, 164 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296, 306 (1939); *Niemotko* v. *Maryland*, 340 U. S. 268, 273 (1951); *Kunz* v. *New York*, 340 U. S. 290, 293 (1950); *Staub* v. *Baxley*, 355 U. S. 313, 321 (1958).

It has further been held that prior restraints on speech are not justified because of apprehensions of disorder. In *Kunz* v. *New York, supra*, at 292, the speaker had "ridiculed and denounced other religious beliefs in his meetings." His permit to speak was revoked and he was subsequently convicted for holding a meeting without a permit. In that case, the Court disapproved as a basis for prior restraint even past *disorder*,[8] quite apart from past *speech*:

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[6] Blackstone, Commentaries, v. 4, 151-152.

[7] Story on the Constitution, *supra*, 1882-1889.

[8] In a recent decision affecting petitioners at bar, the United States District Court for the District of Maryland, relying on

> "The court below has mistakenly derived support for its conclusion from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence." *Ibid.*

In *Near* v. *Minnesota, supra,* at 720, the Court said that previous restraint against speech is not justified even where "charges are made of derelictions which constitute crimes." Compare *DeJonge* v. *Oregon,* 299 U. S. 353 (1937). There "The Saturday Press" was ordered "abated" as a public nuisance based on a finding that it had been a "malicious, scandalous and defamatory newspaper," 283 U. S. at 706. The Court said that subsequent punishment was the only valid sanction. In *Hague* v. *C. I. O.,* 307 U. S. 496, 516 (1939), the Director of Safety had refused a permit to

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decisions of this Court, required a permit to be issued in Baltimore, despite evidence of past disorder at petitioners' rallies. *Norton* v. *Ensor,* 269 F. Supp. 533 (1967). There, as here, the denial of the permit had been based on "previous activities of the applicants and the Party . . . [s]pecifically . . . a tape recording and films of the rallies . . . ." The Court found that:

> Defendant considers, and the Court agrees, that the evidence shows that speakers at those rallies incited persons in attendance to riot. Many participants in the rallies did riot, attacking Negroes who lived about six blocks from the site of the rally. Photographs of such attacks were offered in evidence.
>
> Later in the summer a similar rally was held in Princess Anne, Somerset County, Maryland, where inflammatory speeches were made but violence was averted by the arrival of a large number of State Troopers. *Id.* at 536.

Nonetheless, the District Court held the relevant ordinance, in part, an "impermissible prior restraint upon plaintiffs' right of free speech and assembly," *id.* at 537, and ordered the permit to be issued.

speak in order to prevent "riots, disturbances, or disorderly assemblage." The Court acknowledged that "prohibition of all speaking will undoubtedly 'prevent' such eventualities," but required the State to exercise its "duty to maintain order in connection with the existence of the right."[9] Thus, even where, as here, officials allegedly seek to prevent disorder by restraining speech, the Court has found that that risk must be subordinated to First Amendment rights.

Milk Wagon Drivers Union v. *Meadowmoor*, 312 U. S. 287 (1941), relied on by the court below, is not to the contrary. The injunction affirmed there was not issued following First Amendment activity unaccompanied by violence, as in the instant case.[10] Rather, the Court found that the pickets had *themselves* engaged in extensive violence involving "window-smashings, bombings, burnings, the wrecking of trucks, shootings and beatings." *Id.* at 292. The essential ingredient of the *Meadowmoor* injunction, as Mr. Justice Frankfurter repeated throughout his opinion, was "contemporaneously violent conduct" in a labor dispute where picketing had become part of a "coercive thrust" and a "continuing intimidation" against storekeepers who would not deal with union drivers. *Id.* at 292, 294, 298.

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[9] Compare *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Cir. 1947), cert. denied 332 U. S. 851 (1948), where members of Jehovah's Witnesses sued to bar local authorities from preventing them from holding a meeting after fights had developed at a prior meeting and word had come that hundreds of people would attempt to prevent another meeting. The Court of Appeals said: "Certainly the fundamental rights to assemble, to speak, and to worship cannot be abridged merely because persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised." *Id.* at 881.

[10] Compare *Amalgamated Food Employers Union Local 590* v. *Logan Valley Plaza, Inc.*, 36 U. S. L. Week 4385 (May 20, 1968).

At the same time Mr. Justice Frankfurter expressly reaffirmed the invalidity of prior restraints against speech and the vitality of the prohibitions announced in *Near* v. *Minnesota, supra.* Although "future coercion" could be prevented, he said:

> "Right to free speech in the future cannot be forfeited because of disassociated acts of past violence. Nor may a state enjoin peaceful picketing merely because it may provoke violence in others. *Near* v. *Minnesota,* 283 U. S. 697, 721, 722; *Cantwell* v. *Connecticut,* 310 U. S. 296." 312 U. S. at 296.

In *Thomas* v. *Collins,* 323 U. S. 516 (1945), four years after *Meadowmoor,* the Court demonstrated that it had not retreated from the principles of *Near.* Thomas had been held in contempt of a restraining order—issued *ex parte,* as here—because he had delivered a speech without complying with a Texas statute regulating the solicitation of membership in trade unions. The Court found that:

> "If the exercise of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. . . . We think that a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." 323 U. S. at 540.

The Court's admonitions against prior restraint were the basis for requiring the issuance of a permit to use a park for a speech in *Rockwell* v. *Morris*, 211 N. Y. S. 2d 25, appeal dismissed, 215 N. Y. S. 2d 502, cert. den. 368 U. S. 913 (1961). Rockwell, "reputedly, a rabid racist", had been denied a permit by the lower court because he had

> ". . . by speech and pamphlet accused more than two and a half million residents of New York City of being traitors, identified by their ethnic and religious classification; that he was a 'self-confessed, advocate of violence and Hitlerian methods;' and that if he spoke it was 'inevitable that public disorder and riot will result.'" 211 N. Y. S. 2d at 28.

The New York Appellate Division held that Rockwell's speech could be penalized only after he "speaks criminally" regardless of what was known of the "shocking quality" of his views . . . and "even their alarming impact." *Id.* at 28, 35.

Feiner v. *New York*, 340 U. S. 315 (1950), demonstrates that maintenance of order by appropriate police action, based upon the imminence of actual danger, is sufficient.[11]

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[11] This is especially true today when sophisticated preventive police measures are readily available. As Prof. Emerson has pointed out:

> The basic decision made by the framers that adequate protection can be afforded the interest in internal order through sanctions confined to the illegal action itself applies with even greater force to the problem in our times. The powers and resources of modern government, if exercised with skill and vigor, are sufficient to the task . . . . A community which sincerely undertakes to maintain law and order without suppressing expression possesses the powers and techniques to accomplish that task. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 932 (1963).

See also Report of The National Advisory Commission on Civil Disorders, Chap. 12, *Control of Disorder* (1968).

Feiner addressed an "open-air meeting" before a "crowd of about seventy-five or eighty people, both Negro and white . . . . [P]etitioner . . . speaking in a loud, high-pitched voice . . . gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights." *Id.* at 316, 317. The Court upheld Feiner's conviction for disorderly conduct after its examination of the record convinced it of the presence of actual danger despite the attempts of the police to control the crowd. Finding that the petitioner had "undertake[n] incitement to riot," the Court concluded that the police were not "powerless to prevent a breach of the peace." *Id.* at 321. The same remedy was available to the Maryland police. They did not employ it because there was no disturbance at petitioners' rally. The injunction against future rallies was an unconstitutional substitute for police protection and planning.

The court below avoided the clear lesson of this Court's decisions, and of the *Rockwell* case, by describing this case as one not involving "prior restraint, as in *Rockwell*", because "[t]he restraint was not imposed upon the speakers until after the matter was given the disciplined review of the court" [12] (A. ——). Thus, the Maryland Court, carving out an exception to the doctrine of prior restraint, held that courts are to be entrusted with a function denied to other agents of the state. Yet if "[n]o one may be required to obtain a license in order to speak," *Thomas* v.

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[12] But an authoritative article on prior restraint states:

> "A second form of prior restraint involves judicial officials and is based upon the injunction or similar judicial process, enforced through a contempt proceeding."

Emerson, "The Doctrine of Prior Restraint," 20 Law and Contemporary Problems, 648, 655 (1955).

Collins, supra at 543 (Douglas, *J.*, concurring), must one nevertheless answer to a court to enjoy the right?

This Court recognized long ago that prior restraint is a misuse of state power no matter how it is exercised.[13] The question was settled in *Near*, where the statute at issue was sought to be justified by a procedure permitting a hearing before an injunction issued to restrain publication. This Court said that a judicial hearing to determine the validity of prior restraint in advance of an injunction would itself give courts ominous power over speech:

> "The statute in question cannot be justified by reason of the fact that the publisher is permitted to show [cause] before injunction issues . . . . If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer . . . and required to produce proof . . . . The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct . . . necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected." 283 U. S. at 721.[14]

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[13] Compare *Freedman* v. *Maryland*, 380 U. S. 51, 55 (1965), where the Court expressed concern that prior restraint is made the more onerous because of the "risk of delay . . . built into the Maryland [film censorship] procedure." The Court cited a reported case in which "the initial judicial determination has taken four months and final vindication of the film on appellate review, six months." The case at bar has been in the courts nearly two years.

[14] "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940).

Cantwell v. *Connecticut, supra,* at 306, provided the occasion for a similar warning that the "availability of a judicial remedy" cannot provide the basis for prior restraint:

> "A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action." [15]

If state courts were empowered to issue injunctions against speakers the power would insure the infringement of the rights of locally unpopular speakers, for it is they alone who would be held to answer to courts before they speak. The approval of such state power would sanction the discriminatory enforcement which has so often been forbidden when states chose to construe criminal statutes against unpopular speakers. *DeJonge* v. *Oregon, supra; Cantwell* v. *Connecticut, supra; Marsh* v. *Alabama,* 326 U. S. 501 (1946); *Brown* v. *Louisiana,* 383 U. S. 131 (1966); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Garner* v. *Louisiana,* 368 U. S. 157 (1961) (Harlan, *J.*, concurring). Like the statute condemned in *Thornhill* v. *Alabama, supra,* at 98, the power would "readily lend itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, result[ing] in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within their purview." See *Fields* v. *Fairfield,* 375 U. S. 248 (1963).

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[15] *Rockwell* similarly denied power of prior restraint to courts along with "the policemen or the Commissioner", leaving them to "provide punishment under criminal standards for the unlawful act already committed." 211 N. Y. S. 2d at 37.

Preferred First Amendment rights, enjoying paramount protection even from punishment, have a special "sanctity" from prior restraint. *Thomas* v. *Collins, supra* at 530. Once prior restraints are imposed by the state, irreversible harm is done, for the harm is the restraint itself. *Lovell* v. *Griffin, supra; Schneider* v. *Irvington, supra; Jamison* v. *Texas,* 318 U. S. 413 (1943); *Niemotko* v. *Maryland, supra; Fowler* v. *Rhode Island,* 345 U. S. 647 (1953). The result is "suppression—not punishment." *Kunz* v. *New York, supra,* at 295. This Court should reaffirm the principle that "[s]ubsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." *Near* v. *Minnesota, supra,* at 720.

II.

The injunctions were unconstitutional intrusions on free speech because no clear and present danger existed.

A. *This case is controlled by prior decisions of this Court which forbid interference with provocative political speech.*

Though we have argued for an absolute prohibition against prior restraints directed towards public meetings, the court below justified the restraint in this case because "the lower court acted in the face of a clear and present danger in issuing the temporary restraining order . . ." (A. 121). If any restraints are to be allowed at all, we accept for the purposes of this case that the presence of a clear and present danger should be the measure. No such danger existed on the facts of this case.

The First Amendment has long been tested against provocative expression. Our constitutional tradition has tol-

erated both the most provocative speech, *Terminiello* v. *Chicago*, 337 U. S. 1 (1949), and unpopular speech, *Edwards* v. *South Carolina, supra.* The decisions in which the Court has charted the expansive boundaries of speech under the First Amendment have often involved race or religion, subjects liable to arouse unusual passions. In *Terminiello* v. *Chicago, supra,* the speaker was an advocate of racism and anti-semitism in the postwar period when popular sensibilities were especially hostile to his views. The police were unable to prevent several disturbances among the crowd of a thousand protesters who had gathered.[16] But the court announced a standard that has guided it in free speech cases:

> "Accordingly a function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." 337 U. S. at 4.

Like *Terminiello,* petitioners belong to a controversial minority whose political philosophy embodies unpopular views about Negroes and Jews. But if they are to be enjoined from expressing their views, then other unpopular minorities such as those protected by this Court in *Edwards* v. *South Carolina, supra,* and *Cox* v. *Louisiana, supra,* will not long avoid similar restraints.

Edwards relied on *Terminiello* to protect a Negro minority in the South from punishment for the "peaceful ex-

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[16] The extent of actual disturbance in *Terminiello* is in decided contrast to the facts of the case at bar. See 337 U. S. at 14-16 (Frankfurter, J., dissenting).

pression of unpopular views" against segregation. 372 U. S. at 237. Evidence of [petitioners'] "'boisterous,' 'loud,' and 'flamboyant' conduct," of "'a dangerous situation . . . really building up'" and of "'an actual interference with traffic and an imminently threatened disturbance of the peace of the community'" were insufficient to override First Amendment rights. *Id.* at 233, 239. This Court looked instead to the entire record, which like the record here, showed that "There was no violence or threat of violence on [petitioners'] part, or on the part of any member of the crowd watching them. Police protection was 'ample.'" *Id.* at 236. Refusing to substitute its familiarity "with the almost spontaneous combustion in some Southern communities in such a situation",[17] the court reversed the convictions of the speakers for breach of the peace.

In *Cox* v. *Louisiana, supra,* the racial issue had pitted 1500 angry Negro college students against a crowd of "'muttering' and 'grumbling' . . . white onlookers." 379 U. S. at 543. Of particular relevancy to the instant case was the Court's explicit rejection of the lower court's reasoning that general community tensions required the arrests there:

> "[T]he trial judge . . . stated as his reason for convicting Cox of disturbing the peace that '[i]t must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white business district in the City of Baton Rouge and congregate across the street from the courthouse and sing songs as described to me by the defendant as the CORE national anthem carry-

[17] 372 U. S. at 244 (Clark, *J.*, dissenting).

> ing lines such as 'black and white together' and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served." *Id.* at 536.

The court below relied on just this kind of generalized "testimony . . . as to the temper of the community" over a number of years.[18] Wide-ranging testimony of disturbances from two years before arising from civil rights sit-in demonstrations was allowed, although none of the stale events reported arose because of inciting speech.

The court below conceded that "most of the time" the county in which petitioners spoke "is a tranquil community" (A. 115). The same rally might have elicited a more volatile response in other communities. Words spoken in a small rural locale may well settle differently than in a swollen ghetto metropolis. But this Court has always depended on the record before it in First Amendment cases because "the character of every act depends upon the circumstances in which it is done." *Schenck* v. *United States*, 249 U. S. 47, 52 (1919).

The Court's warning in *Near* is particularly apt:

> "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited."[19]

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[18] The more specific testimony as to the reaction of the community during the rally revealed no more than "a very tense atmosphere" (A. 122). But there was an ample police force of 60 on hand (A. 47), and the Negroes present, though angered, remained in a group apart from the whites (A. 57).

[19] 283 U. S. at 722, quoting *New Yorker Staats-Zeitung* v. *Nolan*, 89 N. J. Eq. 387, 388, 105 Atl. 72.

This is particularly the case in a diverse society whose health and dynamism is inevitably measured by its tolerance of controversy. This Court has not silenced that controversy in the past when minorities have sought to put forth unpopular views. *Garner* v. *Louisiana, supra; Brown* v. *Louisiana, supra; Edwards* v. *South Carolina, supra; Cox* v. *Louisiana, supra.* It follows that if "law and order are not . . . to be preserved by depriving . . . Negro children of their constitutional rights," *Cooper* v. *Aaron,* 358 U. S. 1, 16 (1958), those who oppose the movement for Negro rights must share the constitutional protection which this Court has made available to all.

B. Petitioners' speech was not subject to curtailment under decisions of this Court which exclude a narrow class of action words from constitutional protection.

The court below, rejecting *Terminiello* and its progeny, chose to follow *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942), and *Beauharnais* v. *Illinois,* 243 U. S. 250 (1952). Neither of these narrowly drawn decisions are properly the basis for prior restraint based upon speech at a past political rally where violence neither occurred nor was imminent.

The "fighting words" doctrine in *Chaplinsky* was narrowly limited to

> "... certain well-defined and narrowly limited classes of speech . . . the lewd and obscene, the profane, the libelous, and the insulting . . . 'face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker . . .'" 315 U. S. at 572-573.

The doctrine has been interpreted to mean "the use of speech inseparably locked with action" between individuals.[20] But the court below broadened the meaning of *Chaplinsky* to include political speech addressed to a crowd. That this expansion exceeds the bounds drawn by Mr. Justice Murphy in *Chaplinsky* has been demonstrated in a study tracing the origin of the "fighting words" doctrine. Prof. Kalven traced the "Murphy passage back to its source . . . a paragraph in Chafee's *Free Speech in the United States,*" and found that Chafee had been concerned with

> ". . . words like obscenity, profanity and gross libels upon individuals because the very utterance of such words is considered to inflict a present injury upon listeners, readers or those defamed or else to render highly probable an immediate breach of the peace. This is a very different matter from punishing words because they express ideas which are thought to cause a future danger to the state." [21]

Kalven concludes from this that

> "What Chafee, and hence Murphy, is saying is really that a certain class of face-to-face epithets are . . . per se freighted with a clear and present danger." *Op. cit.* at 49-50.

Petitioners' words were not such epithets calculated to create a clear and present danger. The rally, however dis-

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[20] Emerson, *op. cit.* at 932. Such action words, Prof. Emerson says, include "sheer threats of immediate physical harm delivered on a person-to-person basis." *Ibid.* See also *Garner* v. *Louisiana*, *supra*, at 196.

[21] Quoted in Kalven, The Negro and the First Amendment, 49.

quieting, solicited members for peaceful activity in a political party (A. 109-110) and concerned such issues as federal school desegregation guidelines (A. 88-89) and the Rumford Fair Housing Act in California (A. 103); it bore no resemblance to Chaplinsky's face-to-face taunt that the officer who took him into custody was a "'God damned racketeer' and 'a damned Fascist.'" 315 U. S. at 569. Far from making a political speech, Chaplinsky was engaging in face-to-face personal vilification. Petitioners, however, used the word "nigger" and similar words as part and parcel of their political philosophy under which they believed that "every time you call a nigger a colored person, you are apologizing to them for being black" (A. 97). *Chaplinsky* was never meant to reach such political speech, which, just as much as milder political speech, affects the "vitality of civil and political institutions in our society." *Terminiello* v. *Chicago, supra,* at 4.

Petitioners' case is analogous not to *Chaplinsky* but to *Cantwell* v. *Connecticut, supra.* Cantwell requested two pedestrians on the street to listen to a record describing a book entitled "Enemies." The Court said that:

> "The record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows. The hearers were in fact highly offended. One of them said he felt like hitting Cantwell and the other that he was tempted to throw Cantwell off the street." 310 U. S. at 309.

Petitioners' rally had the *Cantwell* quality of provocative, even offensive criticism of another group, not the *Chaplinsky* quality of face-to-face vilification of another person unrelated to the expression of a point of view. *Cantwell* elevated the distinction to constitutional dimension:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenet of one man may seem the rankest error to his neighbor. To persuade others to his point of view, the pleader, as we know, at times resorts to exaggeration, to vilification . . . and even to false statement. But the people of this nation have ordained . . . that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." 310 U. S. at 310.

Thus, what has been said of *Cantwell* in relation to *Chaplinsky* is equally true of the distinction between petitioners' case and *Chaplinsky*:

> "His exaggeration and vilification were excesses of discussion and persuasion which a society interested in preserving freedom of speech had to accept. . . . The two cases [*Cantwell* and *Chaplinsky*] dramatically point out the difference between the word as act and the word as idea." [22]

Petitioners' rally did not invite violent action, but cautioned against it (A. 87, 95, 111). It is true that their words were passionately directed against the doctrine of racial tolerance they abhor. But this Court has allowed that:

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[22] Note, *Verbal Acts and Ideas—The Common Sense of Free Speech*, 16 U. Chi. L. Rev. 328, 331 (1949).

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did . . . utterances honestly believed contribute to the free exchange of ideas and the ascertainment of truth."[23]

If petitioners' provocative political speech can be enjoined, then the measure of the "word as an idea" will be but a measure of the extent of controversy contained in that idea.

Nor can the narrow holding of *Beauharnais* v. *Illinois, supra,* be stretched to fit this case. Whatever vitality *Beauharnais* retains after sixteen years;[24] that case depended on the existence of the statute at issue[25] and does not otherwise import group libel into our jurisprudence.[26] That *Beauharnais* could be relied on by the court below to reinforce the doctrine of "fighting words", indicates how easily

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[23] *Garrison* v. *Louisiana,* 379 U. S. 64, 73 (1964).

[24] With Justices Douglas and Black, petitioners believe that "*Beauharnais* v. *Illinois* . . . should be overruled." *Garrison* v. *Louisiana,* 379 U. S. at 82. Further, "[i]t is instructive to note. . . . that Illinois when it revised its criminal code in 1961, withdrew from it the very statute the Court had ratified in the *Beauharnais* case." Kalven, *op. cit.* at 7. And "[t]he decision has produced no new similar legislation, nor has it produced increased litigation. In total effect, *Beauharnais* exists in a vacuum." 13 Cleve-Mar. L. Rev. 1, 19 (1964). Much has been written criticizing the group libel concept. See Clark, 13 Cleve-Mar. L. Rev., *supra,* at 3; Chafee, Government and Mass Communications, 116-130; Kalven, *supra,* Chap. 1; Cahn, The Predicament of Democratic Man, 135-139 (1961); Reisman, *Democracy and Defamation: Control of Group Libel,* 42 Col. L. Rev. 727, 742-743; Emerson, *supra* at 924.

[25] The State of Maryland has neither group libel nor criminal libel laws.

[26] See Konvitz, Fundamental Liberties of a Free People, 150 (1957).

the group libel concept can be used to curtail legitimate though provocative speech.[27]

It was the danger posed to freedom of speech by the law of libel which *New York Times* v. *Sullivan*, 376 U. S. 254 (1964) and *Garrison* v. *Louisiana, supra*, were designed to deter.[28] *New York Times* placed libel alongside "the various other formulae[29] . . . for the repression of expression [which] can claim no talismanic immunity from constitutional limitations." *Id.* at 264. To erase any seeming inconsistency between the constitutional restriction now applied to libel and the old *Beauharnais* decision, the Court

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[27] This Court in *Garrison* v. *Louisiana, supra*, at 69, observed:

> "Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that '. . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.' Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 924 (1963)."

[28] *New York Times* particularly disapproves seditious libel, the source of group libel.

> Prior to the rise of liberalism, the established church was one of the most important supports of the temporal authorities. For this reason protection against defamation extended to the church with which the autocratic regime of the particular country identified itself—Catholic or Protestant—thus also to the beliefs of some of the population, immunized to insult and defamation in the religious sphere. In the United States no one sect has been powerful enough to get control of the state apparatus . . . . On the whole, the result is that American law has not been shaped to protect religious doctrine or religious groups from libelous abuse.

Reisman, op. cit. at 739-740. See also *Beauharnais* v. *Illinois, supra*, at 272 (Justices Black and Douglas dissenting).

[29] Including "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business." 376 U. S. at 269.

made clear that group libel too is not immune from constitutional scrutiny,[30] for it recalled that in *Beauharnais*, the Court had been "careful to note that it 'retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel.'" *Id.* at 286. Granting *Beauharnais* only the narrowest validity, *New York Times* pointed out that the libel in *Beauharnais* had been "both defamatory of a racial group and 'liable to cause violence and disorder'."[31] *Ibid.* Any use of *Beauharnais* today to buttress the "fighting words" doctrine would signal a retreat from the high standard this Court has since set.

Professor Cahn has demonstrated the danger of even-handed state suppression of offensive speech aimed at groups:

> "Of course, the state should begin by prosecuting anyone who distributed the Hebrew Bible, which in innumerable passages portrays the depravity of Jews . . . . Greek literature would be banned for calling the rest of the world 'barbarians.' Roman authors would suffer because when they were not defaming the Gallic

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[30] To make the point perfectly clear, the Court said in *Garrison* v. *Louisiana*, *supra*, at 68, n. 3, that "nothing in . . . *Beauharnais* forecloses inquiry into whether the use of libel laws, civil or criminal, to impose sanctions upon criticism of the local conduct of public officials transgresses constitutional limitations protecting freedom of expression. Whether the libel law be civil or criminal, it must satisfy relevant constitutional standards."

[31] In light of *New York Times* it is difficult to argue that *Beauharnais* is still good law, for "[i]n the course of the opinion Mr. Justice Brennan discussed criminal libel in a manner casting doubt on the validity of all criminal libel enactments and reinterpreted *Beauharnais*, emphasizing potential violence as the basis of the decision." Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 Stanford L. Rev. 789, 820 (1964).

> and Teutonic tribes they were denigrating the Italians. The Christian writers of the Middle Ages frequently castigated both Jews and Mohammedans. Dante consigned entire vocations and professions to the Inferno. During and after the Reformation, Catholics and Protestants wrote dreadful things about those whom they reciprocally styled 'heretical,' an epithet which when properly understood and aggregated comprised the whole population of Christendom. Shakespeare bluntly affronted the French, the Welsh, the Danes, the Calibans of the underdeveloped countries, and sundry important denizens of the fairy kingdom. Dozens of writers from Sheridan and Dickens to Shaw and Joyce insulted the Irish. And surely any author or statesman who ever championed the emancipation of Negro slaves or the equal treatment of Negro citizens had to be guilty of portraying a specific 'depravity or lack of virtue' in the dominant majority." [32]

So telling a demonstration reinforces Chafee's warning that "all these crimes of injurious words must be kept within very narrow limits if they are not to give excessive opportunities ofr outlawing of heterodox ideas." Chafee, *op. cit.* at 173.

In a heterogeneous society, "the aims and activities of racial and religious groups are matters of genuine public interest" and the "denunciation of racial and religious groups" from time to time is inevitable. Feinberg, "Can Anti-Semitism Be Outlawed," 6 *Contemp. Jewish Record* 619 (1943). But this does not mean that disorder is inevitable, for, as Prof. Konvitz has emphasized, one may not have the

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[32] Cahn, *op. cit.* at 138-139.

right to use "fighting words," but that is an entirely different matter from preventing individuals from making speeches. Konvitz, *op. cit.* at 181. This right to be free from prior restraint does not imply the right "to make a speech which incites to disturbance or riot . . . . Because an act may not be prevented does not mean it may not be subsequently punished." *Ibid.*

Time, Inc. v. *Hill,* 385 U. S. 374 (1967), in its extension of the *New York Times* doctrine to cases in which private individuals are involved in matters "of public interest", discredits the view that sensitive subjects of public interest require prior restraint. "[T]he state has no legitimate interest in protecting any and all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views." *Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 505 (1952). Nor can the subject of race today enjoy only measured and moderate exchange.

There is both realism and wisdom in Mr. Justice Clark's view that "we cannot expect the judicial process to control such utterances," Clark, *supra* at 3. For if

> " . . . [t]oday a white man stands convicted for protesting in unseemly language against . . . decisions invalidating restrictive covenants. [t]omorrow a Negro will be hailed before a court for denouncing lynch law in heated terms [and] [f]arm laborers in the West who compete with field hands drifting up from Mexico; whites who feel the pressure of orientals; a minority which finds employment going to members of the dominant religious group . . ."[33]

[33] *Beauharnais* v. *Illinois, supra,* at 286 (Mr. Justice Douglas dissenting).

Like the first of the eminent line of prior restraint cases in this Court, this case "raises questions of grave importance transcending the local interests involved." *Near* v. *Minnesota, supra,* at 707. If the decision of the Maryland court is allowed to stand, it will establish a menacing device for prior restriction of speech and will invite its duplication in other jurisdictions. The Court should forbid the intrusion of the power of the injunction where First Amendment rights are to be exercised.

III.

This case is not moot.

Walker v. *City of Birmingham,* 388 U. S. 307 (1967), makes clear that this case is not moot. *Walker* held that "respect for judicial process" requires that an injunction must be obeyed, and that its constitutional validity cannot be tested by violating it. 388 U. S. at 321. Thus the only proper manner of challenging an injunction is by "orderly judicial review." *Id.* at 326.

Petitioners have pursued the path required by *Walker.* If the Court decides that that path is a blind alley leading to a dismissal for mootness, the *Walker* rule and the doctrine of mootness will create a no-man's land where the validity of an injunction cannot be tested either by violating it or by appealing it. Such a rule would emasculate all First Amendment rights and encourage the development of the injunction as a new "scheme of governmental censorship." *Bantam Books* v. *Sullivan, supra,* at 64.

The problem is aggravated when an injunction is issued *ex parte* as in *Walker* and the present case. As the dissent indicated in *Walker*:

> "[The] *ex parte* temporary injunction has a long and odious history in this country, and its susceptibility to misuse is all too apparent from the facts of the case . . . . The labor injunction fell into disrepute largely because it was abused in precisely the same way that the injunctive power was abused in this case. Judges who were not sympathetic to the union cause commonly issued, without notice or hearing, broad restraining orders . . . . The injunctions might later be dissolved, but in the meantime strikes would be crippled because the occasion on which concerted activity might have been effective had passed. Such injunctions, so long discredited as weapons against concerted labor activity, have now been given new life by this Court as weapons against the exercise of First Amendment freedoms." 388 U. S. at 330-331 (Warren, *C.J.*, dissenting).

The abuse of *ex parte* orders in First Amendment cases can be corrected only by effective review. Thus it is crucial that the right to appeal from such orders be clearly protected. Too often *ex parte* orders are obtained from local courts by local authorities antagonistic to the views of persons claiming First Amendment rights. See *Thomas* v. *Collins, supra.* The doctrine of mootness would deny First Amendment claimants judicial review, a result which would simultaneously deny them First Amendment rights.

This Court has often held that "state procedural requirements which are not strictly or regularly followed cannot deprive us of the right of review." *Barr* v. *City of Columbia,* 378 U. S. 146, 149 (1964). See also *NAACP* v. *Alabama ex rel. Flowers,* 377 U. S. 288 (1964); *Wright* v.

Georgia, 373 U. S. 284 (1963). Nor can an artificial procedural rule be applied which would lead to the same result. See *Burstyn* v. *Wilson, supra; Bantam Books* v. *Sullivan, supra.*

Furthermore, the Court has established a limited role for the doctrine of mootness. A case becomes moot "[where] by an act of the parties, or a subsequent law, the existing controversy has come to an end." *United States* v. *Alaska S.S. Co.,* 253 U. S. 113, 116 (1920). In other words, a case becomes moot where a distinct change of position by one of the parties or where a change required by law has ended the controversy giving rise to the suit. Thus when Congress modified the bill of lading issued by the Interstate Commerce Commission, which was the subject of the suit in the *Alaska S.S. Co.* case, *supra,* the controversy over the original bill of lading was concluded. When a labor union during a strike against a local gas company objected to the invocation of a state law permitting the seizure by the Governor of a public utility, the case became moot after the labor union ended the strike and the workers returned to their jobs. *Oil Workers Union* v. *Missouri,* 361 U. S. 363 (1960). When a woman sought a building permit which was initially refused and a *mandamus* action was initiated to require its issuance, the case became moot when the authorities subsequently issued the permit. *Brownlow* v. *Schwartz,* 261 U. S. 216 (1923). In each of these cases the parties or outside authority took steps which effectively ended the original controversy. The parties, at the time their appeals were to be heard, had nothing to argue about.

Similarly the passage of time may end a dispute, and a case may become moot for that reason. When a child claiming rights under a child labor statute became of age,

the law "cannot affect him further" and his case for an injunction must fall. *Atherton Mills* v. *Johnston*, 259 U. S. 13, 15 (1922). An action brought to contest the revocation of a license became moot when the license would have expired under its original terms. *Security Mutual Life Co.* v. *Prewitt*, 200 U. S. 446 (1906). In both of these instances the passage of time had affected the parties' legal status and a distinct change in their position, although not voluntarily made, had taken place.

Thus, in the present case, if petitioner National States Rights Party had been disbanded, or if a new law had altered the legal position of the parties, this case would be moot. But neither has occurred. The situation underlying the dispute is self-perpetuating, for petitioners could not today express their political views as they did in Princess Anne on August 6, 1967.[24] As one commentator notes, "If the situation is self-perpetuating the parties are entitled to an adjudication which will apply to the renewed phase of the controversy in existence at the date of decision." Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. of Pa. L. Rev. 125, 135-36 (1946).

This Court held in *Motor Coach Employers* v. *Missouri*, 374 U. S. 74 (1963) that a case challenging the Governor's seizure of a public transit company did not become moot when the Governor returned the company to its owner. The underlying labor dispute had not been resolved (unlike the situation in *Oil Workers Union, supra*) and there existed "in the . . . case not merely the speculative possibility of invocation of the King-Thompson Act in some future labor dispute, but the presence of an existing un-

[24] See Petition for a Writ of Certiorari, App. pp. 20a-23a.

resolved dispute which continues subject to all the provisions of the Act." 374 U. S. at 78.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 433 (1911), the Interstate Commerce Commission had ordered the defendant to cease giving preference to a specific company for two years. The order expired before the Supreme Court could hear the case. The claim of mootness was denied by the Court:

> "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and *their consideration ought not to be, as they might be, defeated by short term orders, capable of repetition, yet evading review*, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." 219 U. S. at 515 (emphasis added).

See also *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 308 (1897); *Porter* v. *Lee*, 328 U. S. 246 (1946).

Similarly, in this case, the dispute is unresolved and continuing, and the right of petitioners to hold public meetings "ought not to be, as [it] might be, defeated by short term orders, capable of repetition, yet evading review." [35] Local authorities cannot be permitted to seek short term orders against public meetings, secure injunc-

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[35] Like the censorship procedure disapproved in *Freedman* v. *Maryland, supra*, at 60, 61, an injunction assures that speech is "prohibited pending judicial review, however protracted" and involves the speakers in litigation which may be "unduly expensive or protracted" . . . with possibly "the most propitious opportunity" for speaking long past.

tions for as long as ten months, as here, and then evade review in the Supreme Court by claiming a case is moot because the injunction has expired. State officials could thus evade any authoritative interpretation of vital First Amendment questions by this Court through the simple expedient of securing injunctions for a specific period which will expire before review can be secured here.

A temporary injunction, like the censor's determination in *Freedman* v. *Maryland, supra,* at 58, "may in practice be final." In the case at bar, petitioners are effectively and permanently barred from expressing their provocative views. The state has thus "adopt[ed] . . . procedures without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Property Search Warrant,* 367 U. S. 717, 731 (1961). Thus it is the procedure itself which must be disapproved, quite apart from technical mootness questions. As this Court has said before, "it is enough to say that in passing upon constitutional questions the Court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect." *Near* v. *Minnesota, supra,* at 708.

Like the statute condemned in *Near,* an injunction,

> ". . . not only operates to suppress the offending [speech] but to put the [speaker] under an effective censorship . . . Whether he would be permitted again to publish matters deemed to be derogatory . . . would depend upon the court's ruling." 286 U. S. at 712.

The injunctions at issue here have thus become a convenient device now available to state officials who wish to avoid this Court's decisions forbidding prior restraint. In the past, the Court has not refused "to look through form to the sub-

stance and recognize . . . censorship." *Bantam Books* v. *Sullivan, supra,* at 67. Vigilance requires explicit disavowal of the injunction in this case.

CONCLUSION

For all the reasons stated above, the injunctions should be declared unconstitutional.

Respectfully submitted,

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